

1 JOHN F. LENDERMAN #82269  
Attorney at Law  
2 303 South 8th Street  
El Centro, California 92243  
3 Telephone: (760) 353-7949

4 Attorney for SAMUEL E. SINGH  
5  
6  
7

8 **UNITED STATES BANKRUPTCY COURT**  
9 **SOUTHERN DISTRICT OF CALIFORNIA**

10 In Re:

11 SAMUEL E. SINGH

12 Debtor

CASE NO.: 08-07659-T7

POST TRIAL BRIEF

13  
14 MARCUS FAMILY LAW CENTER, PLC

15 Plaintiff,

16 -vs-

17 SAMUEL E. SINGH,

18 Defendant.

ADVERSARY NO.: 08-90513

19  
20 SAMUEL E. SINGH

21 Cross-Claimant,

22 -vs-

23 MARCUS FAMILY LAW CENTER, PLC  
AND ETHAN MARCUS

24 Cross-Defendant.  
25

26 Comes now the debtor by and through his counsel who submits  
27 this post trial brief. Plaintiff shall be referred to "MFLC" or  
28 "creditor" and all references shall be to the court filed

1 documents or the trial transcript which has references to page  
2 and line number.

3 **Facts**

4 1. Creditor never showed to the 341(a) hearing (P106, L4-6).

5 2. Debtor complied with all trustee documentation and reporting  
6 requirements including account balances on date of filing. The  
7 meeting was concluded and trustee has taken no further action in  
8 this case.

9 3. The Adversary Proceeding (AP) was filed on day fifty-nine  
10 AFTER the 341(a) and past the time for any trustee to object to  
11 any claimed exemption.

12 4. Debtor was not sophisticated and sincere through his  
13 testimony (P41, L4-L21) and he had trouble remembering dates  
14 through the hearing.

15 5. He did pay one-half of the creditor's fee to divide the  
16 pension but the work was not being done (P118, L19-P119 L2) and  
17 the debtor had limited resources to pay per his testimony and  
18 Schedules I & J (P124, L9-L22). His expenses exceeded his income  
19 (P40, L8-L20).

20 6. We note that all creditors especially MFLC were on notice of  
21 this debtor's limited means including the fact that he pays  
22 support.

23 7. Creditor did work on receivables and was to collect after  
24 trial (P133, L14-17) and the debtor did make limited payments  
25 (P134, L1-2).

26 8. The lead attorney working on the case had no personal  
27 knowledge of the account but understood payment would come from a  
28 house refinance (P137-L38). The **lead attorney suggested to**

1 **debtor to file bankruptcy.** (P143).

2 9. The one-half interest of wife's pension was in fact listed  
3 as unknown in Schedules and it was specifically referenced  
4 providing a trustee, creditor or any interested party notice to  
5 find the asset or conduct further inquiries.

6 **Purported Lien**

7 10. The law regarding charging liens is clear. Since 2004 an  
8 attorney must comply with certain requirements to obtain a lien  
9 in a case. These specific requirements are delineated in  
10 Fletcher v. Davis (2004) 33 Cal4th. 61, 66 and include:

11 a. A writing signed by both parties (attorney and client).

12 b. Requirement that client seek or have time to seek or  
13 obtain independent counseling with a referral by attorney  
14 claiming the lien.

15 c. Fully informed consent of any conflict and adequate  
16 time to sign.

17 11. Statutory Authority. Further California Business and  
18 Professions Code §6148 which has been judicially noticed requires  
19 a writing **signed by the attorney** as well as the client and this  
20 was not done by Mr. Marcus or any attorney member of his firm  
21 (P100, L21) and contract date post 2004 **with no third party**  
22 **attorney to advise of lien so voidable by debtor.** No signature,  
23 no lien.

24 12. Also, counsel did not follow the California Rules of  
25 Professional Conduct namely Rules 3-300 and 3-310, an ethics  
26 violation that should be reported by the trier of fact, see  
27 Segovia, *infra*.

28 / / /

1 13. Assuming innuendo that absent a lien, an attorney is  
2 entitled to a reasonable fee that "claim" would be absolved at  
3 this juncture or be unsecured, more *infra*.

4 14. Invalid lien as not fully described, In re Segovia (Bankr ND  
5 Cal. 2008). The property subject to the lien must be adequately  
6 described. It was not. Further, lien not enforceable as an  
7 ethical violation. The facts in Segovia are substantially  
8 similar with the case at bar and debtor suggests the court read  
9 that case in full. **In the case at bar attorney never signed the**  
10 **contract. Nor was there any third party attorney consultation.**

11 15. Invalid lien as not perfected. A charging lien must first  
12 be perfected. Family law attorneys may file a Family Law  
13 Attorney's Real Property Lien (FLARPL, pronounced "flarr-pull").  
14 This is a statutory lien and was not done in this case. Second,  
15 the lien must adequately describe the property and this was not  
16 accomplished. See In re Bush 356 BR 28 (Bankr SD Cal, 2006)

17 16. Simply stated there is no charging lien as voidable by  
18 debtor. At best Plaintiff has an unsecured claim which has been  
19 extinguished, Johnson v. Home State Bank 501 U.S. 78 (1991).

20 17. Creditor has not met any burden of proof by preponderance of  
21 evidence Grogan v. Garner 498 U.S. 279, 291 (1991) on either the  
22 523 or 727 claim.

23 18. Date of Promise, alleged fraud. Creditor seems to claim  
24 that the date of promise was the date of the contract. If so the  
25 debtor did in fact make many payments including interim payments  
26 as well as payments over \$20,000 (P68, L13- L21) (P69, L7 - L14)  
27 (P71). Further, even when the accounting person at MFLC called  
28 debtor re payments debtor asked what about the QDRO and no

1 further work was being done as monies were owed (no work done  
2 with no reliance upon any promise). Further still, MFLC has not  
3 **proven the date** of any false post-petition promise. At trial  
4 their **witness stated she did not know the date debtor promised to**  
5 **pay** (P134, L19-21).

6 19. Creditor has not met his burden per In re Dougherty, In re  
7 Kong, and Anastas at the time of the purported false  
8 representation must be specific and proven by a **preponderance of**  
9 **evidence**.

10 20. Burden of Proof not met on either 523 or 727 claim as no  
11 proof of 1) misrepresentation, fraudulent omission or deceptive  
12 conduct by debtor 2) knowledge of falsity of deception 3) intent  
13 to deceive 4) reliance by creditor In re Syman 234 F3d 1081 (9<sup>th</sup>,  
14 2000).

15 21. Again, the asset was listed. There is no on going duty to  
16 give updated information to the trustee if listed, In re Adair  
17 253 B.R.85 (9<sup>th</sup>, 2000). We note that in Adair the asset was  
18 listed as 'unknown' and later determined to be 20k.

19 22. A simple statement will suffice if actual value not known  
20 and this was enough information that was provided for the trustee  
21 to make inquiries, In re Wende 107 BR 70, 72. Debtor can testify  
22 the value is unknown. In Re Spitko 357 BR 272 (Bankr E.D. Pa.  
23 2006). The trustee did not make any inquiry about this asset.  
24 He had enough information as the meeting was concluded. Again,  
25 MFLC did not attend the 341(a) nor do any other examination  
26 before filing.

27 23. The nature of debtor's cooperation is coextensive with the  
28 tasks to be performed by the trustee in administering the estate

1 In re Nesse 137 BR 797, 800 (Bankr CD Cal, 1992) Cooperation must  
2 be construed broadly and required a debtor to respond whenever  
3 the trustee calls upon him for assistance in the performance of  
4 the trustee's duties Id. At 801. A debtor will have fulfilled  
5 his 521 duties if he cooperates to the best of his ability.

6 Absent a trustee's express request for additional or ongoing  
7 information, 521 does not impose upon a debtor the ongoing duty  
8 to provide information to the trustee with regard to assets the  
9 debtor disclosed in her bankruptcy schedules, Adair 253 BR 85 at  
10 90.

11 24. What is unknown? Unknown listing. Values of \$1 or unknown  
12 are red flags and all trustees are on notice that an asset may  
13 turn out to be exempt, Collier on Bankruptcy ¶8.06(1)(c)(ii, see  
14 also In re Barross-Herrans 524 F.3d 341 (1<sup>st</sup>, 2008). One cannot  
15 say that the trustee did not have knowledge of something. In the  
16 case at bar the trustee was the best person at the time of filing  
17 to have any knowledge of the amount of pension interest not the  
18 debtor. Again, the debtor was not sophisticated and certainly  
19 did not know how to proceed at that juncture in time. The court  
20 has already noted that the trustee is not a party to this action.

21 25. Value of Asset is at time of filing, the completion of  
22 Schedules, In re Adair (9<sup>th</sup> BAP 2000) and debtor did not know the  
23 value as he relied upon his counsel (complicated matter, actuary  
24 needed) at that time and he did not honestly have knowledge.  
25 Further, the testimony indicated that the creditor attorney was  
26 to do the work to liquidate the QDRO. When debtor inquired  
27 about status of QDRO debtor told by accounting person ...it was a  
28 complicated matter and would take time (P50, L17) (P54, L 6-9)

1 [actuary required]. Debtor was frustrated in that he thought the  
 2 work was being done and it was not (P64, L4-9) (P65, L25 -P66,  
 3 L5). Simply stated the debtor did not know the amount of the  
 4 pension at the time of filing and he disclosed all that he knew  
 5 at that time.

#### 6 **Court Discretion Considering Multiple Factors**

7 26. Court's discretion if Asset Listed as unknown in a 727 case.  
 8 If an asset is listed as unknown the court is given discretion  
 9 whether this is sufficient. Generally this is done by "bad  
 10 faith" cases where there are multiple errors in schedules, SOFA,  
 11 where misrepresentations are made in an attempt to manipulate the  
 12 court, In re Sullivan (1st BAP, 2005), see also In re Cabral  
 13 (1<sup>st</sup>, 2002) examining debtor's sincerity and as a general rule  
 14 whether or not sufficient information is given for a trustee to  
 15 conduct an examination to locate the asset In re Krause (Bankr  
 16 Kansas, 2009) with the general rule being the "totality of the  
 17 circumstances" test, In re Yates (Bankr SD Cal 2009) examining  
 18 multiple issues raised a debtor's demeanor and sincerity or  
 19 whether or not attempts to evade the law or "game" the system.

20 27. Another test is whether or not the listing is so defective  
 21 as to forestall a proper investigation of the asset In re Cusano  
 22 264 F.3d 936 [Cusano v. Klein] (9<sup>th</sup>, 2001). Here enough was  
 23 provided for a trustee to examine as debtor was a public employee  
 24 as was his ex and inquiries could be made of those pensions.

25 28. In fact he was led to believe by MFLC that "only any  
 26 attorney could do it" "it being complicated" and only after  
 27 talking to his ex wife's counsel that he was getting a good deal  
 28 did he realize that the \$9,000 he received was the amount (P52,

1 L12-15) which took place **AFTER FILING HIS BANKRUPTCY CASE.**

2 29. Months after filing he got the forms and figured it out post  
3 filing per a side agreement with his wife (and her counsel) after  
4 calling some administrator and talking to his ex (P 54, L6). He  
5 was surprised in that all it took was one phone call to her  
6 pension people [arguably with her consent or cooperation with  
7 likely privacy issues as no discovery conducted] (P54-55) and it  
8 happened after filing of the AP and in 2009 (P61, L19).

9 30. Creditor did not do the work toward the QDRO and **no**  
10 **justifiable reliance** where someone at MFLC told debtor to pay  
11 MFLC then file bankruptcy (P142, L25 - P 143, L9). The firm knew  
12 that bankruptcy was an option when representation made, told  
13 about "lien" pay us then file bk, In re Kirsch 973F.2d 1454, In  
14 re Britton (1991) 950 F.2d 602, 604.

15 31. Debtor has done nothing with intent to hinder, delay or  
16 defraud a creditor or officer of the estate 727(a)(2) made a  
17 false oath (a) (4) or (5). No intent was proven.

18 32. At best the creditor has attempted a tracing cause of action  
19 in some asset under the hope that a lien existed. With no lien  
20 there is nothing. As to the 523(a)(2) action every attorney with  
21 a so called charging lien would be able to do this in bankruptcy  
22 court and claim assets rather than as unsecured discharged debt.  
23 I do not believe this is the law.

24 **Specific Questions Court Made Inquiry or Desired**

25 **Issues to be Addressed**

26 33. Does 727 action continue if no longer creditor of estate?  
27 Simply stated no unless fraudulent omission within 1 year of  
28 discharge 727(d) with action by "interested party" or trustee.



1 34. 727(a)(5) what is substantial? An interesting question.  
2 While many would believe inconsequential value argument including  
3 up to \$5,000.00 (amount of abandonment by trustee due to costs of  
4 administration) the case law holds any amount over \$1,000. In re  
5 Yates, *supra*, although there were other factors in that case and  
6 "totality of circumstances" test would be a better rule rather  
7 than strict dollar amount, see Adair case (unknown turning out  
8 to 20k later).

9 **523 issues compared to 727**

10 35. See also In re Merena 413 BR 792, 814 (9<sup>th</sup>, 2009) where  
11 materiality compared to actual assets distributed making some  
12 significant difference and on the issue of fraud, fraud must be  
13 actual (not proven here) on the relationship of 523 versus 727  
14 rather than use this court's term "substantial" Merena court used  
15 "materiality" and related that to a false oath standard of  
16 perjury, ergo if perjury or likely perjury then 727 action,  
17 Merena at 814.

18 36. Court characterized Wife's pension as "zero value" and  
19 wanted to know what happens to that as it was disclosed at trial.  
20 Another interesting inquiry. Rather than do an amendment at this  
21 juncture we should simply advise the trustee. This may raise  
22 further issues as under past case law "unknown" does include  
23 exempt property and the time for trustee objection has passed.  
24 Debtor expended much time on the issue of what "unknown" has  
25 meant in past cases. Besides being a **red flag** placing trustee on  
26 notice of something in order to conduct his inquiries and do his  
27 statutory 541 duties thus placing trustee on notice of something  
28 for any inquiry.

1 37. Unknown is the value at time of filing and the record  
2 indicates that debtor was in fact honest in that he did not know  
3 the value at the time of filing. He later found out the issue  
4 may not be that complicated (after having been told by **this**  
5 **creditor attorney** that he needed an attorney, possibly an  
6 actuary) and may be accomplished himself months after filing. If  
7 anyone was misled it was the debtor.

8 38. If court directs debtor's counsel to amend I will consider  
9 that direction or the court may advise the trustee of what  
10 transpired at trial. At this juncture it is best let go as the  
11 court did indicate that the debtor and creditor are the only  
12 players at this time, the trustee electing not to participate.

13 39. Whether 523(a)(2) claim viable? Debtor has addressed this  
14 in previous argument as well as law. First, creditor has not met  
15 his burden on issues of date of purported misrepresentation,  
16 actual fraud, even implied fraud (payments made, work stopped so  
17 no detrimental reliance). Of all of the necessary elements all  
18 creditor has proven was damage and that element is admitted by  
19 debtor in filing Schedules.

20 **Summary of Argument**

21 40. Request court read Fletcher v. Davis on issue of attorney's  
22 responsibility to client to explain nature and duty of that  
23 relationship to create a lien. We argue an affirmative duty both  
24 ethically and legally to do more than what was done in this case.

25 41. Read the Bus. & Prof. Code Sections 3-300 and 3-310 re  
26 ethical duties of counsel. Again, not done.

27 42. No attorney signature at all.

28 / / /

1 43. It is obvious Hobson's choice argument when retained by  
2 staff.

3 44. No FLARPL, statutory or judicial lien.

4 45. Sufficient data shown to trustee to conduct meaningful  
5 examination into affairs and debtor disclosed all he honestly  
6 knew at time of filing.

7 46. Insufficient proof re 523 case as well as 727 considering  
8 debtor entitled to fresh start.

9 47. We reserve our rights on the 523(d) issue pending this  
10 court's decision to motion for fees. We do request that the  
11 court make specific findings, considering the foregoing law both  
12 legal and ethical violations, that the creditor's position in  
13 this matter was not substantially justified.

14 48. For the foregoing reasons the AP should be denied.  
15

16 Dated: February 8, 2010

/s/ JOHN F. LENDERMAN  
JOHN F. LENDERMAN  
Attorney for Debtor

CSD 3010 [04/28/96]

Name, Address, Telephone No. &amp; I.D. No.

JOHN F. LENDERMAN, 82269  
 Attorney at Law  
 303 S. Eighth Street  
 El Centro, CA 92243  
 Telephone: 760.353.7949

## UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF CALIFORNIA  
 325 West "F" Street, San Diego, California 92101-6991

In Re

SAMUEL E. SINGH

Debtor.

BANKRUPTCY NO. 08-07659-T7

MARCUS FAMILY LAW CENTER, PLC

Plaintiff(s)

ADVERSARY NO. 08-90513

v.

SAMUEL E. SINGH

Defendants(s)

## PROOF OF SERVICE

I, Monica Escalera, certify that I am, and at all times during the service of process was, not less than 18 years of age and not a party to the matter concerning which service of process was made. I further certify that I served a copy of the following documents [describe each document served]:

POST TRIAL BRIEF

on February 8, 2010 by:  
 [date]

☐ Mail Service - Regular, first class United States mail, postage fully pre-paid, addressed to:

☒ Personal Service - By leaving the documents with the following named person(s) or an officer or agent of the person(s) at:  
 Hand delivery to: FERNANDO SILVA - Employee for Marcus Family Law Center  
 303 S. Eighth Street, El Centro, CA 92243

☐ Residence Service - By leaving the documents with the following adult at:

Under penalty of perjury, I declare that the foregoing is true and correct.

February 8, 2010

[Date]

  
 [Signature]

Print Name	Monica Escalera
Business Address	303 S. Eighth Street
City, State, ZIP	El Centro, CA 92243

CSD 3010